No. 07-1102

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES CANAS, *et ux.*, as natural guardians and next friends of DEREK CANAS, *et al.*,

Petitioners,

v.

AYMAN AL-JABI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR RESPONDENTS DR. AYMAN AL-JABI, DR. SHARON J. KAMINER, AND MCG HEALTH, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, MCG Health, Inc., is a 501(c)(3) corporation.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 ... i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES v

STATEMENT OF THE CASE 1

1. Derek's Heart Procedure in 1985 2

2. Drs. Kaminer and Al-Jabi's Treatment of Derek 2

3. Timing of Alleged Malpractice by Drs. Kaminer and Al-Jabi 3

REASONS FOR DENYING THE PETITION 6

I. The Georgia Statutes Do Not Violate The Equal Protection And Due Process Clauses Of The Fourteenth Amendment. 7

A. Equal Protection 7

B. Due Process 16

Contents

Page

II. Uniformity Among the States Regarding State and Federal Courts' Constitutional Analyses of Individual State Medical Malpractice Statutes of Limitation and Repose is Neither Required Nor Appropriate. 19

A. Statutes of Limitation and Repose Are the Type of Legislation Which May Conflict from State to State Because They Are Social and Economic Legislation. 19

B. The Georgia Legislature's Interest Against Stale Claims is a Legitimate State Interest. 21

C. Cases Cited by Petitioner as Conflicting with Georgia Courts' Constitutional Analyses of Georgia's Statutes of Limitation and Repose Are Distinguishable Because: (1) The Relevant Statutes Cited in Those Cases Are Dissimilar to Georgia's Statutes of Limitation and Repose; and (2) Many Cases Cited by Petitioners Held the State Statutes Unconstitutional as a Matter of State Constitutional Law and Not Federal Constitutional Law. 26

Contents

Page

1. The Various State Statutes Cited by Petitioners are Distinguishable. 26

2. The Violations Found by Many of the Courts in Decisions Cited by Petitioners Were of State Constitutions and Not of the Federal Constitution. 30

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

Brubaker v. Cavanaugh,
741 F.2d 318 (10th Cir. 1984) 12

Chase Securities Corp. v. Donaldson,
325 U.S. 304 (1945) ..... *passim*

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 9, 19

City of New Orleans v. Dukes,
427 U.S. 297 (1976) 9, 19, 20, 31

DiAntonio v. Northampton-Accomack Memorial Hosp.,
628 F.2d 287 (4th Cir. 1980) 13

Douglas v. Hugh A. Stallings, M.D., Inc.,
870 F.2d 1242 (7th Cir. 1989) ..... *passim*

Duke Power Co. v. Carolina Environ. Study Group,
438 U.S. 59 (1978) 19

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 13

G.D. Searle & Co. v. Cohn,
455 U.S. 404 (1982) 11

Cited Authorities

Page

Gronne v. Abrams,
793 F.2d 74 (2nd Cir. 1986) 12

Heller v. Doe,
509 U.S. 312 (1993) 13

Hoffman v. United States,
767 F.2d 1431 (9th Cir. 1985) 12

Houk v. Furman,
613 F. Supp. 1022 (D. Me. 1985) 19

Martinez v. California,
444 U.S. 277 (1980) 18, 19

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 10, 12

Montagino v. Canale,
792 F.2d 554 (5th Cir. 1986) 12

Order of Railroad Telegraphers v. Railway Express Agency, Inc.,
321 U.S. 342 (1944) 21, 22, 23

Plyler v. Doe,
457 U.S. 202 (1982) 20

Cited Authorities

Page

State Cases:

Allrid v. Emory University,
285 S.E.2d 521 (Ga. 1982) 23

Canas v. Al-Jabi,
639 S.E.2d 494 (Ga. App. 2006) 5

Carson v. Maurer,
424 A.2d 825 (N.H. 1980) 30

Couch v. Parker et al.,
630 S.E.2d 364 (Ga. 2006) 31

Craven v. Lowndes County Hosp. Auth.,
437 S.E.2d 308 (Ga. 1993) 15, 16, 21, 24

Crowe v. Humana, Inc.,
439 S.E.2d 654 (Ga. 1994) 15, 16

Hoem v. State,
756 P.2d 780 (Wyo. 1988) 26

Jaramillo v. Heaton,
100 P.3d 204 (N.M. Ct. App. 2004) ... 22, 27, 28, 29

Kaminer v. Canas,
653 S.E.2d 691 (Ga. 2007) 6

Kane v. Shoup,
580 S.E.2d 555 (Ga. App. 2003) 17

Cited Authorities

Page

Kenyon v. Hammer,
688 P.2d. 961 (Az. 1984) 22, 30

Lee v. Gaufin,
867 P.2d 572 (Utah 1993) 22, 28, 29, 30

Love v. Whirlpool Corp.,
449 S.E.2d 602 (Ga. 1994) 19

Lyons v. Lederle Laboratories,
440 N.W.2d 769 (S.D. 1989) 22, 27, 28, 30

Mominee v. Scherbarth,
503 N.E.2d 717 (Ohio 1986) 22, 28, 30

Nelms v. Georgian Manor Condo. Assn.,
321 S.E.2d 330 (Ga. 1984) 31

Sax v. Votteler,
648 S.W.2d 661 (Tex. 1983) 22, 27, 28, 30

Schwan v. Riverside Methodist Hospital,
452 N.E.2d 1337 (Ohio 1983) 22, 28, 30

Smith v. Cobb County-Kennestone Hospital Auth.,
423 S.E.2d 235 (Ga. 1992) 13, 14, 15, 16, 23

Cited Authorities

Page

Constitution:

GA. Const. art. I, § I, par. XII 31

United States Constitution
Fourteenth Amendment 6, 7, 8, 16, 20

State Statutes:

O.C.G.A. § 9-3-71 ..... *passim*

O.C.G.A. § 9-3-73 ..... *passim*

O.C.G.A. § 9-3-90 ..... 13, 14, 16

Ind. Code § 16-9.5-3-1 8

Ind. Code § 33-1-1.5-5 17

N.M.S.A. §§ 41-5-1 et seq. 22, 28

Utah Code Ann. § 78-14-4 (1993) 29

STATEMENT OF THE CASE

In January and February 1985, shortly before the FDA began screening blood for the HIV/AIDS virus, Petitioner Derek Canas ("Derek") received blood transfusions at the Medical College of Georgia Hospital in Augusta, Georgia. Derek was two months old at the time and was suffering from a heart defect. In April 2001, when Derek was 16 years old, he was diagnosed with HIV. Allegedly, the blood he received in 1985 was contaminated with HIV/AIDS.

On December 28, 2001, Derek through his parents filed this medical malpractice lawsuit against defendants Dr. Sharon J. Kaminer, Derek's pediatric cardiologist who treated Derek at the Medical College of Georgia ("MCG") from 1991-2001, and against Dr. Ayman Al-Jabi, Derek's pediatrician from 1993-2000. Derek and his parents, the current Petitioners, alleged that Drs. Kaminer and Al-jabi failed to timely diagnose that Derek had AIDS. Petitioners amended the lawsuit on February 6, 2003 to add as defendants the Board of Regents of the University System of Georgia d/b/a Medical College of Georgia ("BOR")[1] (Dr. Kaminer's employer at the time she treated Derek) and MCG Health, Inc. ("MCGHI")[2], the entity that began operating the MCG Hospital on July 1, 2000, pursuant to a series of contracts with the BOR. All of the defendants moved for summary

1. This Brief is filed jointly by all Respondents with the exception of the BOR, which elected to file its own Brief.

2. MCGHI is a 501(c)(3) non-profit corporation. Prior to July 1, 2000, MCGHI did not manage, own, lease, or operate the MCG Hospital. At no time did MCGHI ever employ Dr. Kaminer.

judgment on grounds including, but not limited to, that the Petitioners' medical malpractice claims are barred by the applicable Georgia statutes of limitations and repose.

1. Derek's Heart Procedure in 1985

On January 18, 1985, six years before his first appointment with Dr. Kaminer and eight years before his first appointment with Dr. Al-Jabi, Derek underwent a heart surgery to correct the transposition of his great arteries and his total anomalous venous return condition. As a result of the heart procedure and certain complications, Derek received multiple blood or blood product transfusions in January and February of 1985, which were allegedly tainted with HIV. Petitioners contend that Drs. Kaminer and Al-Jabi failed to recognize that, beginning as early as 1994, Derek had symptoms of HIV, and that the two physicians failed to have Derek tested or referred to a doctor for testing in a timely fashion.

2. Drs. Kaminer and Al-Jabi's Treatment of Derek

Dr. Kaminer was a Pediatric Cardiologist at MCG. As a pediatric cardiologist, she was primarily responsible for Derek's cardiovascular care. She began treating Derek on May 30, 1991, when Derek was approximately six years old, and treated him until February 15, 2001 (with a gap in treatment from 1996-2000).[3] When Derek

3. Dr. Kaminer saw Derek at approximate one-year intervals between May of 1991 and August of 1996. From (Cont'd)

went to MCG's Cardiovascular Clinic, Dr. Kaminer would perform a routine cardiac physical exam, which included monitoring the pacemaker that was placed during his 1985 surgery. Dr. Al-Jabi was Derek's pediatrician who began seeing Derek in May of 1993. He last saw Derek in March of 2000. Throughout the time Dr. Al-Jabi followed Derek, he treated Derek for routine childhood illnesses, such as bronchitis, rhinitis, colds, respiratory infections and ear infections.

3. Timing of Alleged Malpractice by Drs. Kaminer and Al-Jabi

Significantly absent from the Petitioners' recitation of facts is the evidence from their expert witnesses regarding the alleged malpractice committed by Drs. Al-Jabi and Kaminer ("the Doctors"). The Petitioners' experts testified that a number of events should have raised red flags in the Doctors' minds that Derek was potentially HIV positive. The experts contend that in response to these red flags, the Doctors should have either referred Derek to a specialist for further evaluation or conducted further testing on their own.

Most significantly, Dr. John Sleasman testified that Derek's treating physicians should have recognized, no later than 1994, that Derek had signs and symptoms

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(Cont'd)

August of 1996 and February of 2000, Derek's parents did not bring him to the MCG Cardiovascular Clinic for any exam or treatment, for reasons unknown to Dr. Kaminer. Derek then returned to see Dr. Kaminer on February 17, 2000 and she followed his care until his last visit on February 15, 2001.

consistent with HIV.[4] Dr. Sleasman testified that, in addition to suffering from stunted growth, Derek had "recurrent pneumonia/bronchitis . . . , chronic persistent diarrhea, which was called irritable bowel syndrome, and . . . persistent gingivostomatitis. Those were the four things that fulfilled the CDC criteria for HIV-associated conditions." According to another one of Petitioners' experts, Dr. Janice Milligan, the Doctors should have recognized that Derek had stunted growth and should have referred him to a medical specialist to evaluate the stunted growth when he was nine and one-half years old (or in 1994). Petitioners claim that following 1994, the Doctors continued to fail to recognize or investigate Derek's HIV-related symptoms.

On December 28, 2001, Petitioners filed suit against Drs. Kaminer and Al-Jabi, almost two years after the five-year Georgia medical malpractice statute of repose expired (in the fourth quarter of 1999), and five years after the two-year Georgia medical malpractice statute of limitations expired (in the fourth quarter of 1996).[5] Each Respondent subsequently filed motions for summary judgment based upon the expiration of the statutes of repose and limitations (O.C.G.A. §§ 9-3-71 and 9-3-73).

On September 19, 2005, the trial court entered an order partially granting and partially denying

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4. Notably, Petitioners' experts have testified that Derek suffered from signs and symptoms of HIV/AIDS consistently from the time of his blood transfusions in early 1985.

5. The Complaint was later amended to add the BOR and MCGHI.

Respondents' motions. In a separate order dated October 14, 2005, the trial court expressly upheld the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, as these statutes apply to medical malpractice claims of minors. Following the entry of the October 14, 2005 order, Petitioners directly appealed this order to the Georgia Supreme Court, raising the same constitutional arguments being made before this Court. On February 27, 2006, the Georgia Supreme Court issued an order transferring the case to the Georgia Court of Appeals, holding that it had in previous cases addressed and rejected the Petitioners' constitutional challenges to the subject statutes. Petitioners filed a motion for reconsideration before the Georgia Supreme Court, which was denied on April 13, 2006. The matter was subsequently transferred to the Georgia Court of Appeals so that court could address the issue regarding the expiration of the statutes of repose and limitations. The Georgia Court of Appeals essentially affirmed the ruling of the trial court, finding that the Petitioners' malpractice claims were only partially time barred. *See Canas v. Al-Jabi*, 639 S.E.2d 494 (Ga. App. 2006).

In response, all Respondents petitioned the Georgia Supreme Court for a writ of certiorari. Those petitions were granted. At the same time, Petitioners petitioned the Georgia Supreme Court again, arguing the unconstitutionality of the statutes of repose and limitation. As before, the Georgia Supreme Court rejected the Petitioners' constitutional arguments. Petitioners again filed a motion for reconsideration, which the Georgia Supreme Court denied.

Around the same time the matter was transferred to the Georgia Court of Appeals, Petitioners filed their first petition for a writ of certiorari with this Court (No. 05-1671). On October 2, 2006, this Court denied that petition.

On October 29, 2007, the Georgia Supreme Court issued an opinion reversing the Georgia Court of Appeals and holding that the medical malpractice claims against the Doctors were barred in totality. *See Kaminer v. Canas*, 653 S.E.2d 691 (Ga. 2007). The Petitioners then filed the instant Petition before this Court. This Petition is the Petitioners' **sixth** attempt to have a court rule that the Georgia medical malpractice statutes of repose and limitations are unconstitutional. The Petitioners' current arguments are **identical** to those previously asserted in their first petition for certiorari to this Court. The Respondents urge the Court to deny the current Petition for the following reasons.

REASONS FOR DENYING THE PETITION

The federal constitutional issue in the petition is: do Georgia's statutes of limitations and repose applicable to a minor's medical malpractice claim violate the equal protection and due process clauses of the Fourteenth Amendment? The Petitioners contend that the statutes are unconstitutional because, unlike the general statute of limitations for personal injury actions, they require a minor to file a medical malpractice case before he reaches majority. The Petitioners specifically argue that the Fourteenth Amendment precludes the State of Georgia from expecting or requiring a minor "to discern when a medically negligent act has occurred."

(Petition, p. 11.) They claim that review is also warranted because other states' appellate courts have declared similar statutes unconstitutional.

As explained below, there are two main reasons why the Petition does not warrant review. First, as a matter of federal constitutional law, the Georgia statutes do not deny the Petitioners equal protection or due process. Second, there is no federal constitutional requirement that Georgia follow other states' interpretations of similar statutes.

I. The Georgia Statutes Do Not Violate The Equal Protection And Due Process Clauses Of The Fourteenth Amendment.

A. Equal Protection

The threshold issue in analyzing the Petitioners' equal protection challenge is what level of scrutiny applies to the Georgia statutory classifications. The Petitioners contend that "heightened equal protection scrutiny" should apply. (Petition, pp. 31-37.) They cite no decisions of this Court which impose a heightened level of scrutiny for state statutes limiting a minor's right to pursue a medical malpractice claim. Instead, they essentially argue that the Georgia Supreme Court erred in upholding the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73 because such a ruling is inconsistent with prior decisions of that court. (Petition, pp. 14-15, 18-23.)

Thus, the issue remains: what level of scrutiny applies to statutes that supplant general tolling

provisions and require a minor to bring a medical malpractice action before he reaches majority? The Seventh Circuit Court of Appeals addressed this issue in *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989). There, the parents of a disabled child filed a medical malpractice case against the estate and professional corporation of the physician who delivered the child. As a result of the physician's alleged negligence, the child sustained irreversible brain damage. The alleged negligence occurred in Indiana and, therefore, the Indiana statute of limitations applied. The Indiana statute provided a two-year statute of limitations for medical malpractice cases, except that "[i]f the injury occurs to a minor under the age of six, the action may be commenced any time before the child's eighth birthday." *Id.* at 1244, citing Ind. Code § 16-9.5-3-1. Under the pertinent facts, the parents had until 1977 to file suit, but they did not do so until 1984. The district court found that the Indiana statute of limitations barred the parents' action and awarded summary judgment to the defendants. On appeal, the parents argued that the Indiana statute violated the equal protection and due process clauses of the Fourteenth Amendment, because minors such as their child "who will never be free of their legal disability . . . should be treated as a suspect class warranting strict scrutiny, or at a minimum, as a quasi-suspect class requiring heightened scrutiny." *Douglas*, 870 F.2d at 1245.

The Seventh Circuit began by identifying the proper level of scrutiny to apply.

> The success of plaintiffs' equal protection challenge to the malpractice statute of limitations turns on the level of scrutiny applied to the statutory classification. Economic or social legislation which does not involve suspect classifications or infringe on a fundamental interest is presumed constitutional and will be upheld if it is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). It is a rare statute, indeed, which cannot withstand the minimal rational relationship analysis. *But see, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

Douglas, 870 F.2d at 1245. Judge Cummings noted that the parents "have chosen an uphill battle in trying to persuade this Court that persons legally disabled because of minority and mental incapacity are a suspect classification." *Id.* The court rejected the parents' attempt to analogize the classification of mentally incompetent minors "to that of illegitimate children, who have been recognized by the Supreme Court as a quasi-suspect class warranting heightened scrutiny." *Id.* at 1246. In *City of Cleburne*, *supra*, this Court specifically declined "to extend either strict or heightened review to classifications involving the mentally retarded." *Douglas*, 870 F.2d at 1246, citing *City of Cleburne*, 473 U.S. at 446.

The Seventh Circuit then turned to classifications based on age.

> **Likewise, statutes which classify on the basis of age are subject only to the minimal rational relationship review.** 'While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereo-typed characteristics not truly indicative of their abilities.' *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976). Although the classification contained in the malpractice statute of limitations disadvantages minors rather than the elderly as in *Murgia*, **the reasoning behind the Supreme Court's refusal to extend heightened scrutiny to classifications of the aged applies equally to this statute disadvantaging minors; i.e., when the characteristics of a statutory classification are relevant to the legitimate interests of the State, the judiciary need not closely scrutinize the legislation in question. . . . Legislative classification based on youth . . . is clearly relevant to the state's *parens patriae* responsibilities toward minors.**

Douglas, 870 F.2d at 1246-1247 (emphasis added). The court continued:

> The challenged statutory classification of minor children with permanent legal disabilities due to diminished mental capacity implicates the intersection of two characteristics, **which individually warrant only rational relationship review. The concurrence of these two characteristics does not change the Supreme Court's directive that age and mental capacity are often relevant statutory classifications which need only be rationally related to a legitimate state interest.**

Id. at 1247 (emphasis added).

The *Douglas* court next addressed whether a rational relationship existed "between the classification of minors with permanent mental handicaps and the goals of the" Indiana statute. *Id.* The Indiana legislature enacted the medical malpractice statute of limitations "to address the concerns of rising medical costs and the need for comprehensive, affordable health coverage." *Id.* It also "sought to control the escalation of malpractice awards and concomitant increases in insurance premiums and health care costs by modifying the procedural rules for litigation." *Id.* at 1248. Relying on *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945) and *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the *Douglas* court observed that "[i]n general, statutes of limitations provide a desired order and finality to the litigious process by way of an albeit arbitrary, but bright line." *Douglas, id.* The court then found that "[c]reating a shorter period of limitations in which to commence actions against health care providers is clearly a rational

legislative response to the fiscal uncertainties in the health care industry." *Id.* While sympathetic to the parents and their child, the court was "compelled to find that the limits imposed by the malpractice statute of limitations are certainly rationally related to the stated goals of preventing stale claims and controlling the cost of medical care." *Id.* at 1249.

Here, the Petitioners challenge the Georgia statutes for classifying minors with medical malpractice claims differently from minors with other types of tort claims. Similar to the parents in *Douglas*, the Petitioners define the statutory classification "by contrasting the general tolling statute of limitations with the more limited malpractice tolling period." *Id.* at 1245. *Douglas* and, more importantly, *Murgia* establish that statutory classifications based on age are subject to "rational relationship review."[6] This level of scrutiny requires the

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6. Other courts have also applied the rational basis test in rejecting equal protection challenges to legislation creating classifications in the medical malpractice context. *See Gronne v. Abrams*, 793 F.2d 74, 77-78 (2nd Cir. 1986) (New York "statutory distinctions" between medical malpractice plaintiffs and other tort plaintiffs do not amount "to the sort of invidious discrimination prohibited by the fourteenth amendment"); *Montagino v. Canale*, 792 F.2d 554, 556-557 (5th Cir. 1986) (Louisiana medical malpractice statute of limitations "does not impinge on a fundamental right . . . or involve a suspect classification"); *Hoffman v. United States*, 767 F.2d 1431, 1435-1436 (9th Cir. 1985) (California statutory cap on noneconomic losses in medical malpractice cases "does not involve any suspect or quasi-suspect classification, a fundamental right, or a classification requiring a heightened scrutiny"); *Brubaker v. Cavanaugh*, 741 F.2d 318, 321 (10th Cir. 1984) (analyzing Kansas

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Petitioners as the challenging party to show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993), quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Therefore, the Petitioners must show that O.C.G.A. §§ 9-3-71 and 9-3-73 are not rationally related to a legitimate state interest and, in doing so, must refute (1) the Georgia General Assembly's clearly stated objectives and (2) the Georgia Supreme Court's determinations that the subject statutes satisfy the applicable level of scrutiny.

O.C.G.A. § 9-3-71(a) provides a two-year statute of limitations for medical malpractice actions, and O.C.G.A. § 9-3-71(b) imposes a five-year statute of "ultimate repose and abrogation." *See* O.C.G.A. § 9-3-71(c). Prior to 1987, O.C.G.A. § 9-3-90(a) tolled the statutes of limitations and repose as they applied to a minor's cause of action for medical malpractice. *See Smith v. Cobb County-Kennestone Hospital Auth.*, 423 S.E.2d 235, 236 (Ga. 1992). However, in 1987 the Georgia General Assembly amended O.C.G.A. § 9-3-73 and "significantly

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medical malpractice statute of limitations and finding "that a rational relation exists between the shorter limitation period for health care providers and the legitimate objective of providing quality health care in Kansas"); *DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287, 291-292 (4th Cir. 1980) (Virginia legislation found not to violate equal protection because "[t]he different treatment of medical malpractice plaintiffs from other tort plaintiffs is not a denial of equal protection, when the special problems posed by soaring insurance costs are considered").

restricted the period of disability that would toll the operation of O.C.G.A. § 9-3-71." *Smith, id.*

As amended, O.C.G.A. § 9-3-73(b) states that notwithstanding the general tolling provision in O.C.G.A. § 9-3-90(a),

> all minors who have attained the age of five years shall be subject to the periods of limitations for actions for medical malpractice provided in this article [the two-year limitations period in O.C.G.A. § 9-3-71(a)]. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

O.C.G.A. § 9-3-73(c)(2)(A) and (B) require a medical malpractice action on behalf of a minor to be commenced before his tenth birthday if he was under the age of five on the date the malpractice occurred, or within five years from the date of the wrongful act if the minor was five or older on that date. O.C.G.A. § 9-3-73(b) is a statute of limitations for minors' medical malpractice claims and O.C.G.A. § 9-3-73(c) is a statute of repose. *See* O.C.G.A. § 9-3-73(d). The 1987 amendment also contained O.C.G.A. § 9-3-73(f), which states:

> The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this

> Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

The Georgia Supreme Court has rejected several constitutional challenges to the post-1987 versions of O.C.G.A. §§ 9-3-71 and 9-3-73. In *Smith, supra*, the court rejected an equal protection challenge to O.C.G.A. § 9-3-73(b). Applying a rational basis test, the court held "that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives," namely those stated in O.C.G.A. § 9-3-73(f). *Smith*, 423 S.E.2d at 239. In *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993), the plaintiff argued that O.C.G.A. § 9-3-71(b) denied him equal protection of the law because it "creates an arbitrary classification" of medical malpractice claimants. *Id.* at 309. The court rejected this argument, applying the rational basis test and identifying multiple state interests furthered by O.C.G.A. § 9-3-71(b): "Because of the nature of the practice of medicine, uncertainty over the causes of illnesses and injury make it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause." *Id.* at 310. In *Crowe v. Humana, Inc.*, 439 S.E.2d 654 (Ga. 1994), the plaintiffs, parents of a minor child, also

attacked O.C.G.A. § 9-3-73(b) on equal protection grounds. They contended that "O.C.G.A. § 9-3-73(b) violates constitutional equal protection guarantees by excluding minors bringing medical malpractice actions from the general period of disability provided by O.C.G.A. § 9-3-90, and by establishing an arbitrary and unreasonable period of disability." *Id.* at 655. The court found that it already decided this issue adversely to the plaintiffs in *Smith, supra. Crowe, id.*

These decisions of the Georgia Supreme Court are consistent with this Court's determination in *Murgia* that the rational basis test applies to legislation containing age-based classifications. Moreover, the Georgia General Assembly has identified rational, legitimate reasons for separately classifying minors for purposes of medical malpractice cases. *See* O.C.G.A. § 9-3-73(f); *Douglas*, 870 F.2d at 1248-1249. The Petitioners have pointed to no decisions of this Court that require a different result, and they certainly have not met their burden of showing why this Court should reject the Georgia General Assembly's "stated legislative objectives." Therefore, the Georgia Supreme Court correctly held in this case (as well as in *Smith, Craven* and *Crowe*) that O.C.G.A. §§ 9-3-71 and 9-3-73 do not violate the equal protection clause of the Fourteenth Amendment.

B. Due Process

The Petitioners also challenge O.C.G.A. §§ 9-3-71 and 9-3-73 on due process grounds. They argue that due process requires a "discovery rule" for limitations and repose purposes "where the patient has not discovered

either the negligent act or the resultant injury." (Petition, pp. 14, 16-17 and 24-27.) In the medical malpractice context, Georgia law applies the discovery rule only to those situations where a foreign object is left in the patient: the limitations period does not begin to run until after discovery of the negligent act, i.e. the failure to remove or identify the foreign object. *See* O.C.G.A. § 9-3-72. Otherwise, the limitation period begins to run from the date of injury, and in cases alleging misdiagnosis (such as this one), "the date of injury is generally considered to be the date of the misdiagnosis." *Kane v. Shoup*, 580 S.E.2d 555, 557 (Ga. App. 2003). However, the Petitioners argue that "[a]pplying a discovery rule for personal injury cases generally and for foreign object medical cases, while arbitrarily stripping that concept from selected latent medical injury cases is arbitrary and violates due process and equal protection." (Petition, p. 27.)

The Seventh Circuit rejected a very similar argument in *Douglas*, *supra*. The plaintiffs there argued that "application of the occurrence rule which ties the running of the limitations period to the occurrence of the act or omission causing the injury denie[d] them access to court before they [were] aware of the existence of a cause of action." *Douglas*, 870 F.2d at 1249. The court began by dismissing the plaintiffs' premise "that due process requires the state to toll the statute of limitations for persons with legal disabilities such as minority or mental handicap." *Id.* States can modify general tolling provisions without violating due process, just as Indiana did in limiting the general tolling statute's applicability to product liability actions. *See* Ind. Code § 33-1-1.5-5. *Douglas, id.*

The plaintiffs also claimed that "due process requires an indefinite length of time" for filing medical malpractice actions, particularly since the general tolling statute preexisted the malpractice statute of limitations. *Id.* The court disagreed, holding that "a tolling statute, like any procedural rule, cannot vest plaintiffs with a substantive right in the continued protection of that rule." *Id. See also Chase Sec.*, 325 U.S. at 314 (1945). Again explaining that legislatures can modify procedural rules, the Seventh Circuit cited this Court's pronouncement in *Martinez v. California*, 444 U.S. 277, 282 (1980), "that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Douglas*, 870 F.2d at 1250.

The *Douglas* court concluded with what is essentially the Respondents' position in this case.

> As discussed *supra*, the malpractice statute of limitations is clearly rationally related to its goal of relieving the malpractice insurance crisis. It is the province of the Indiana legislature to allocate the increased cost of health care between the health care providers, insurance carriers and patients and to determine under what circumstances it is appropriate to delay the running of the statute of limitations in spite of the increased risk of lost evidence and lapse of memory. The state need not provide a tolling provision for minority and mental incompetence or a discovery rule in order to comply with the due process guarantees of a meaningful opportunity to be heard.

Id.

II. Uniformity Among the States Regarding State and Federal Courts' Constitutional Analyses of Individual State Medical Malpractice Statutes of Limitation and Repose is Neither Required Nor Appropriate.

A. Statutes of Limitation and Repose Are the Type of Legislation Which May Conflict from State to State Because They Are Social and Economic Legislation.

Statutes of limitation and repose are limitations of liability. *Love v. Whirlpool Corp.*, 449 S.E.2d 602 (Ga. 1994). "[A] [l]iability limitation is a classic example of an economic regulation– a legislative effort to structure and accommodate the burdens and benefits of economic life. . . ." (Internal quotations omitted). *Love*, 449 S.E.2d at 606, citing *Duke Power Co. v. Carolina Environ. Study Group*, 438 U.S. 59, 83 (1978). Legislatures are given wide latitude in formulating social and economic legislation based on individual state's goals and governmental interests. *City of Cleburne*, 473 U.S. at 440. Due to respect for the separation of powers, courts are reluctant to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. *Id.* at 441. Courts must refrain from acting as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in the legislative sphere. *Houk v. Furman*, 613 F. Supp. 1022, 1030 (D. Me. 1985), citing *City of New Orleans*, 427 U.S. at 303; *see also Martinez*, 444 U.S. at 283 (federal judges have no authority to judge the wisdom of the legislature's underlying policy determinations).

Because of the wide latitude given in formulating social and economic legislation, it is not a surprise that states may address similar problems with widely varying legislation. These statutes are presumed valid and do not violate the equal protection or due process clause of the Fourteenth Amendment as long as they do not concern a suspect class, a fundamental right, gender, or illegitimacy, and as long as they are rationally related to a legitimate governmental interest. *City of New Orleans*, 427 U.S. at 303. According to this Court in *Plyler v. Doe*, 457 U.S. 202 (1982):

> A [state] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Id.

Therefore, to make a determination whether a state statute is valid, the courts must answer two questions: (1) does the legislation have a legitimate purpose, and (2) was it reasonable for lawmakers to believe that implementation of the statutes in question would promote that legitimate purpose? The main underlying purpose of Georgia's medical malpractice statutes of

limitation and repose is the prevention and elimination of stale claims, which this Court has recognized as a legitimate governmental interest. *See Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944); *Chase Sec.*, 325 U.S. at 314. Additionally, the Georgia Supreme Court has found this reasoning to be a legitimate governmental interest and that the limitations statutes promote that interest. *See Craven, supra.*

B. The Georgia Legislature's Interest Against Stale Claims is a Legitimate State Interest.

As discussed earlier, legislation which does not involve suspect classifications or infringe on fundamental interests is presumed constitutional if it is rationally related to a legitimate state interest. *Douglas*, 870 F.2d at 1245. One of the main underlying purposes of Georgia's medical malpractice statutes of limitation and repose is the prevention and elimination of stale claims, a purpose which has been found by the state supreme court to be a legitimate governmental interest. *Craven, supra.*

The majority of the state and federal courts reviewing the limitation statutes which Petitioners cite found that the sole purpose of the legislation was to combat a perceived medical malpractice crisis. Those analyses fail to take into consideration the difficulties and consequences of litigating stale claims. This goal is stressed as one of the stated objectives of the Georgia statutes and one of the main reasons the Georgia appellate courts have found O.C.G.A. §§ 9-3-71 and 9-3-73 constitutional. Moreover, in *Chase Sec.* and *Order*

of Railroad Telegraphers this Court recognized the prevention and elimination of stale claims as a legitimate governmental interest.

In the cases Petitioners cite from New Mexico, South Dakota, Texas, Utah, Ohio and Arizona, the purpose or objective given for each state's medical malpractice statutes of limitation and/or repose is primarily, if not completely, limited to addressing the perceived medical malpractice crisis facing that state or the nation as a whole.[7] The Petitioners devote multiple pages of their petition denouncing the validity of the states' use of their perceived medical malpractice crises as the basis for the implementation of their respective medical malpractice statutes of limitation and repose (*see* Petition, pp 33-37); however, neither the Petitioners nor the cited opinions dedicate any amount of discussion to the consideration of the difficulties and consequences of litigating stale claims when determining whether the states' objectives are legitimate and whether the statutes in question are rationally related to those objectives. Prominent in the opinions of Georgia's appellate courts are discussions that the objectives of Georgia's medical malpractice statutes of limitation and repose are to avoid the difficulties and consequences of litigating stale claims.

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7. *See Jaramillo v. Heaton*, 100 P.3d 204, 208 (N.M. Ct. App. 2004); *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 771 (S.D. 1989); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983); N.M.S.A. § 41-5-2; *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993); *Schwan v. Riverside Methodist Hospital*, 452 N.E.2d 1337, 1338-1339 (Ohio 1983); *Mominee v. Scherbarth*, 503 N.E. 2d 717, 721 (Ohio 1986); *Kenyon v. Hammer*, 688 P.2d. 961, 964 (Ariz. 1984).

The Georgia Supreme Court found in *Allrid v. Emory University*, 285 S.E.2d 521 (Ga. 1982) and *Smith v. Cobb County-Kennestone Hosp. Auth., supra*:

> Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Smith, 423 S.E.2d at 240.

The Court may recognize these words and phrasing as they are almost identical to those in its opinions of *Order of Railroad Telegraphers* and *Chase Sec.* concerning the purposes of limitations statutes. This Court elaborated in *Chase Sec.*:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [internal cite omitted]. They are by definition arbitrary, and their

> operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the **privilege** to litigate.

Chase Sec., 325 U.S. at 314 (emphasis added).

In *Craven* the Georgia Supreme Court reiterated its opinion that Georgia's medical malpractice statutes of limitation and repose were rationally related to the legitimate interest of the state in eliminating stale claims:

> This amounts to a recognition that the legislature may conclude that the time may arrive when past transgressions are no longer actionable. **The long history of such conclusions emphasizes their rationality.** From the biblical time of the Year of Jubilee to the present day, policymakers have exercised the right to "wipe the slate clean" after a fixed period of time. In doing this, there is a clear distinction between a statute of limitation "barring" an action, and a statute of repose providing for abolition of a cause of action after the passage of the time provided. We cannot say that the legislature acted irrationally when it amended the statute in question.

Craven, 437 S.E.2d at 31 (emphasis added).

It was and is certainly reasonable for Georgia lawmakers to believe that a two year statute of limitation for medical malpractice claims of adults and minors over the age of five would promote the legitimate objective of eliminating stale claims; especially when the alternative suggested by Petitioners of waiting until the disability of minority is removed would allow minors to wait as many as twenty years to bring a claim.[8]

Likewise, it was and is certainly reasonable for Georgia lawmakers to believe that the five year statute of repose for adults and minors aged five and older[9] would promote the legitimate purpose of eliminating state claims, especially when the alternative for minors suggested by the Petitioners would be to toll the five year statute of repose until the child reaches majority which could conceivably allow as many as twenty-three years to pass before the minor's cause of action would be abolished. In this amount of time memories will no doubt fade, witnesses will disappear and/or die, and evidence will most definitely be lost, making the successful pursuit and/or defense of that claim almost impossible for either the plaintiff or the defendant.

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8. Majority status in Georgia is eighteen years old. Therefore, if the two year statute of limitation is determined to be tolled until a minor turns eighteen, then it is possible that twenty years could elapse before a minor is required to file his claim.

9. For minors injured prior to age five, the statute of repose does not expire until the minor's tenth birthday.

C. Cases Cited by Petitioner as Conflicting with Georgia Courts' Constitutional Analyses of Georgia's Statutes of Limitation and Repose Are Distinguishable Because: (1) The Relevant Statutes Cited in Those Cases Are Dissimilar to Georgia's Statutes of Limitation and Repose; and (2) Many Cases Cited by Petitioners Held the State Statutes Unconstitutional as a Matter of State Constitutional Law and Not Federal Constitutional Law.

1. The Various State Statutes Cited by Petitioners are Distinguishable.

The Petitioners focus on only a handful of state statutes of limitation and repose which have been criticized or declared unconstitutional by federal and state courts. However, the majority of courts, particularly federal courts, reviewing similar malpractice statutes have held them constitutional.[10] Even the court in *Hoem v. State*, 756 P.2d 780, 784 (Wyo. 1988), a decision referenced by the Petitioners in their petition, recognized that "in holding as we do that the [medical malpractice] act denies equal protection of the law in violation of the constitution, we are cognizant that the majority of states have upheld similar provisions." *Id.*

With regard to the handful of state statutes cited by Petitioners as "conceptually identical" (Petition, p. 13) to Georgia's statutes of limitations and repose, these statutes are in fact dissimilar to Georgia's statutes in several ways: (1) most of the cited statutes of limitation

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10. *See* n.6, *supra*.

attach and begin to run on the date of the negligent act and not from the date of the first manifestation of injury arising from a negligent act; (2) most of the cited statutes of repose have terms that are shorter than the terms in O.C.G.A. § 9-3-71(b) and O.C.G.A. § 9-3-73(c); (3) some of the limitations statutes cited by Petitioners are part of larger medical malpractice acts creating statutory medical malpractice insurance funds covering those providers who opt-in and pay fees to these insurance funds, and which may or may not be enforced depending on the judges' subjective beliefs as to what may be reasonable under the circumstances of individual cases; and (d) the violations found by many of the courts were of state constitutions and not of the federal constitution.

The statutes of limitation from New Mexico, South Dakota and Texas[11] which Petitioners allege to be indistinguishable from Georgia's statutes of limitation in O.C.G.A. §§ 9-3-71(a) and 9-3-73(b) (Petition, pp. 13, 28-30), actually run from the date of the negligent act which is/can be much earlier than the point at which Georgia's statutes attach and begin to run, *i.e.*, from the date of the first manifestation of an injury. By designating the statute to run at the first sign of an injury as a result of a negligent act, the Georgia legislature provides greater protection to the patient/ plaintiff than would be afforded if the statute ran from the date of the negligent act because the patient has a longer period of time in which to discover the negligence if it is not readily apparent at the time of the alleged negligence.

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11. *See Jaramillo*, 100 P.3d at 206-207; *Lyons*, 440 N.W.2d at 770; *Sax*, 648 S.W.2d at 663.

Furthermore, the statutes of repose in New Mexico, South Dakota, Texas, Utah, and Ohio[12] which Petitioners allege to be indistinguishable from O.C.G.A. §§ 9-3-71(b) and 9-3-73(c) are actually shorter than the five-year term set out in O.C.G.A. § 9-3-71(b) and the five to ten-year terms set out in O.C.G.A. § 9-3-73(c). By having the statute of repose begin to run on or after a child's fifth birthday and by giving the plaintiff five years from that date in which to file the lawsuit, the legislature allows sufficient time for the child to learn how to effectively communicate to his or her parents or guardian about the existence or extent of injuries.[13]

Petitioners also rely heavily on the *Jaramillo* case from New Mexico. However, the New Mexico Medical Malpractice Act[14] is quite unique. New Mexico health care providers can choose to opt-in to the protections of the state's three year statute of limitation/repose by paying $600,000.00 to the state superintendent of insurance and by making regular payments into the statutorily created insurance fund; or, if they choose not to invest these amounts, they do not get the protection of the three year statute of limitation/repose in the New Mexico Medical Malpractice Act. Georgia's medical malpractice statutes of limitation and repose apply to

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12. *See Jaramillo*, 100 P.3d at 206-207, 208; *Lyons*, 440 N.W.2d at 770; *Sax*, 648 S.W.2d at 663; *Lee*, 867 P.2d at 574; *Schwan*, 452 N.E.2d at 1338; and *Mominee*, 503 N.E. 2d at 719-720.

13. *See Douglas, supra.*

14. *Medical Malpractice Act of New Mexico*, N.M.S.A. §§ 41-5-1 et seq.

all licensed physicians in Georgia. Furthermore, the New Mexico courts are not consistent in their application of the state's statute of limitation/repose because the courts may decide not to enforce the statute depending on whether the judges think its effects would be "unreasonable" under the circumstances of the individual case. *Jaramillo*, 100 P.3d at 207. The Georgia courts do not have the option of choosing to enforce or not enforce the provisions of the statutes of limitation and repose.

Finally, the Petitioners use the Utah case of *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993) to argue that minors deserve greater protection under the law. (Petition, pp. 33-35.) However, the statute invalidated in that case made absolutely no distinction in application between negligent acts against minors and negligent acts against adults. The limitations periods applied "regardless of minority."[15] Therefore, unlike the tolling provisions in the Georgia statutes of limitations and repose, the Utah statute was not tolled to any extent for minors. Additionally, to make the time period within which a parent or guardian could file a lawsuit on behalf of a minor even more limited, the clock started at the time of the negligent act (not at the time of a manifestation of injury from a negligent act) and the repose period was only four years. Had the Utah courts been evaluating a provision more similar to the provisions in the Georgia statutes, the outcome may very well have been different.

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15. Utah Code Ann. § 78-14-4 (1993).

2. The Violations Found by Many of the Courts in Decisions Cited by Petitioners Were of State Constitutions and Not of the Federal Constitution.

The federal constitution does not provide a fundamental right to access of the courts. *See Chase Sec., supra.* This Court has found that "statutes of limitation represent a **public policy** about **the privilege to litigate**. Their shelter has never been regarded as what now is called a fundamental right. . . ." (Internal quotations omitted) (emphasis added.) *Douglas*, 870 F.2d at 1249, citing *Chase Sec.*, 325 U.S. at 314.

However, there is no prohibition against a state constitution providing to its citizens rights and protections in addition to those provided by the U.S. Constitution. *Sax*, 648 S.W.2d at 664. The statutes Petitioners cited from New Hampshire, South Dakota, Texas, Arizona, Utah and Ohio were all found to violate various provisions of those states' constitutions[16] which have no counterparts in the federal constitution. Those courts held: (1) that the right to recovery for personal injury and/or the right to access to the courts were fundamental or important substantive rights under their constitutions; (2) that the states' constitutions included open courts provisions; or (3) that the statutes created suspect or quasi-suspect classes and, therefore, the

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16. *See Carson v. Maurer*, 424 A.2d 825, 831 (N.H. 1980); *Lyons*, 440 N.W.2d at 770-772; *Sax*, 648 S.W.2d at 664-667; *Kenyan*, 688 P.2d at 968-975; *Lee*, 867 P.2d at 577-589; *Schwan*, 452 N.E.2d at 301-303; *Mominee*, 503 N.E.2d at 720-722.

statutes in question had to undergo strict or elevated scrutiny to pass constitutional muster.[17]

Although the Georgia Constitution has a "right to courts" provision,[18] the Georgia Supreme Court has interpreted that section to be a "'right of choice' (between self-representation and representation by counsel) provision, and not an 'access to courts' provision such as found in [other states'] constitutions." *Nelms v. Georgian Manor Condo. Assn.*, 321 S.E.2d 330, 333 (Ga. 1984). As such, "there is no express constitutional right of access to the courts under the Georgia Constitution" (internal quotations omitted). *Couch v. Parker et al.*, 630 S.E.2d 364, 366 (Ga. 2006). Therefore, it is illogical to compare other states' "access to courts" constitutional provisions with the provisions of Georgia's constitution.

In text, extent, intent and purpose, the medical malpractice statutes of limitation and repose that Petitioners cite as being indistinguishable from O.C.G.A. §§ 9-3-71 and 9-3-73 are, in fact, very distinguishable. More to the point, the constitutional analyses of these allegedly similar statutes are different from the constitutional analyses of Georgia's statutes. Furthermore, Georgia's statutes of limitation and repose are only subject to rational basis scrutiny, since they do not impinge on a fundamental or important substantive right guaranteed by the federal or state constitutions, and they do not involve a suspect or quasi suspect class, gender or illegitimacy.[19] As discussed

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17. *See* n.16, *supra*.

18. GA. Const. art. I, § I, par. XII.

19. *City of New Orleans*, 427 U.S. at 303.

above, Georgia's interest in preventing and eliminating stale claims is legitimate, and its medical malpractice statutes of limitation and repose rationally promote that interest. Consequently, Georgia's medical malpractice statutes of limitation and repose are constitutional.

CONCLUSION

The Petition does not warrant review. The Petitioners cannot carry their burden of showing that the Georgia statutes are unconstitutional. The Respondents have shown that the rational basis test applies to the statutes and that the Georgia legislature and judiciary have identified legitimate justifications for the statutory classification. The Respondents have further demonstrated that there is no conflict among the state courts in this country in their analyses of their respective statutes of repose and limitations which merits any type of action or regulation by this Court. For these reasons, Respondents respectfully urge this Court to deny Petitioners' Petition.

Respectfully submitted,

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